

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.08.2007

CORAM

THE HONOURABLE MR.JUSTICE P.K.MISRA
AND
THE HONOURABLE MRS.JUSTICE R.BANUMATHI

O.S.A. No.2/2001
against
TOS.No. 10 of 1996

1.K.Geetha
2.V.Jayanthi
3.S.Kothandapani

: Appellants/Plaintiffs

Vs.

1.V.Vasudevan
2.V.Kannan
3.K.Yamunabhai
4.V.Jagadeesan
5.Narayanamurthy
6.Sekar

: Respondents/Defendants

Appeal filed against the Judgment of this Court dated 22.11.1999 in T.O.S.No.10/1996 filed to grant probate of the will executed by Vijayaranga Mudaliar on 20.11.1991.

For appellant : Mr.P.Seshadri

For respondents : Mr.Ajoy Kumar Gnanam for R-5
Mr.M.Kempuraj for respondents 1 to 3
Mr.V.Srikanth for R-6

J U D G M E N T

R.BANUMATHI, J.

Aggrieved against the dismissal of the Testamentary Suit, unsuccessful plaintiffs have preferred this appeal.

2.The dispute is in respect of the Will executed by Dr.Vijayaranga Mudaliar on 20.11.1991. The genealogy of the parties is as under :-

Dr.Vijayaranga Mudaliar
(06.01.1992)

Jagadeesan Son thro' 1 st wife[D-4] (eldest son)	Narayanamoorthy [D-5] (Contesting Defendants)	Sekar	Kannan [D-2] =Geetha [P-1]	Vasudevan [D-1] =Jayanthi [P-2]	Jamunabai [D-3] = Kodandapani [P-3]
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3.For convenience, parties are referred to as per their rank in the suit.

4.The case of the plaintiffs is that the Testator Vijayaranga Mudaliar owned self acquired properties at Sriperumbudur and Chennai and he had executed the Will on 20.11.1991 out of his own volition and free will and in a sound disposing state of mind. P.W.s 2 and 3 Dilip and Raju are the Attestors to the Will. Further case of the plaintiffs is that under the Will, the properties were bequeathed to Kannan and Vasudevan and no properties have been given to the Defendants 1 to 3. Wives of Kannan and Vasudevan and Kothandapani, husband of the daughter, Jamunabai who are plaintiffs 1 to 3, have been appointed as Executors of the Will. Undertaking to duly administer the property, plaintiffs sought probate of the Will.

5.Defendants 5 and 6 have filed Caveat and finding that the Defendants have caveatable interest, the Testamentary OP was converted as suit. Contesting Defendants 5 and 6 filed Written Statement contending that Vijayaranga Mudaliar was suffering from brain tumour and was seriously ill since September 1991 and was admitted in Best Hospital, Chennai and nobody was allowed to see him and Vijayaranga Mudaliar died intestate and therefore, all rights available with regard to movable and immovable properties are liable to be partitioned among the sons and daughters. Contesting Defendants 5 and 6 further alleged that the alleged attesting witnesses in the Will are close dependents of the beneficiaries and they are not responsible persons or elderly members of the community. It was further alleged that the suit Will was brought into existence after legal consultation. Will is surrounded by suspicious circumstances, since the Testator was in an incapacitated mind at the time of execution of the alleged Will and there is no genuineness in the Will.

6.On the above pleadings, four issues were framed. The first plaintiff examined herself as PW-1 and Attestors were examined as P.W.s 2 and 3. Defendants 5 and 6 examined themselves as D.W.s 1 and 2. Ex.P-1 - Will was produced and last page of the Will was found missing.

7. Upon consideration of oral and documentary evidence, the learned Single Judge has held that missing of last page of the Will is a suspicious circumstance, which was not properly explained. Referring to evidence of P.W.s 2 and 3, the learned Single Judge has held that P.W.s 2 and 3 have signed only as identifying witnesses on the reverse of the first page of the Will and their evidence being silent as to their attestation in the last page of the Will. It was further held that evidence of P.W.s 2 and 3 would not prove due execution and attestation of the Will. Pointing out that Vijayaranga Mudaliar was a methodical person, regularly writing diary, the learned Single Judge held that absence of entry in the diary indicating writing and execution of the Will on 20.11.1991 is a suspicious circumstance, which was not dispelled by the plaintiffs. Testator signature as "Vijayarangam" instead of "Dr. Vijayaranga Mudaliar" was also found to be one of the suspicious circumstance.

8. Assailing the findings, the learned Counsel for the plaintiffs inter alia raised the following contentions :-

- The Will being a registered one, solemnity has to be attached to the official act of Registration duly performed by the Sub Registrar;
- P.W.s 2 and 3 have consistently stated that the Testator has understood the contents of the Will and that they have attested and P.W.s 2 and 3 were not examined on those aspects;
- Circumstances held to be suspicious by the learned Single Judge are not genuine suspicions so as to throw doubt upon the genuineness of the Will.

The learned Counsel has placed reliance upon 2002(2) SCC 85 [Madhukar D. Shende v. Tarabai Aba Shedage]; AIR 1977 SC 63 [Beni Chand (since dead) now by Lrs. v. Kamla Kunwar and ors.]; AIR 1955 SC 346 [Girja Datt Singh v. Gangotri Datt Singh]; AIR 1963 SC 1526 [K. Venkataramiah v. A. Seetharama Reddy and ors.]; 2007(1) SCC 546 [Gurdev Kaur and ors. v. Kaki and ors.]; AIR 2004 Madras 403 [Senthilkumar and anr. v. Dhandapani and ors.].

9. On behalf of the appellants, C.M.P.No.116/2001 has been filed under Or.41 R.27 CPC to receive last page of the Will as additional evidence. The learned Counsel submitted that for rendering substantial justice, an opportunity has to be given to the plaintiffs, by receiving additional evidence. Placing reliance upon a number of cases, it was submitted that when something remains obscure, the Appellate Court has to receive additional evidence for rendering justice.

10. The learned Counsel for the Defendants 5 and 6 contended that the Testator being a methodical person, missing of last page of Will throws doubts on the genuineness of the Will. Drawing our attention to the

recitals in the Will, the learned Counsel submitted that no better provision was made to Defendants 5 and 6 and while so, exclusion of Defendants 5 and 6 is unnatural. Assailing the evidence of P.W.s 2 and 3, it was submitted that they had no animus attestandi to attest the Will. The learned Counsel has placed reliance upon - AIR 1976 SC 1053 [Natha Singh and ors. v. The Financial Commissioner, Taxation, Punjan and ors.]; 2006(5) CTC 351 [Robert Prabhakar v. David Ebenezer]; 2006(5) CTC 332 [Rengasamy v. Rugmini and ors.]; AIR 2001 SC 134 [Mahavir Singh v. Naresh Chandra and anr.].

11.The main contention of the Defendants is that the suit Will was not executed by the Testator out of his own volition and free will and the Will is surrounded by suspicious circumstances and that plaintiffs are not entitled to probate.

12.Execution and Attestation of the Will :-

It is first of all necessary for the plaintiffs to prove the valid execution and attestation of the Will. Let us consider whether the plaintiffs have proved valid execution and attestation of the Will as per the provisions of the Evidence Act and the Indian Succession Act as well. The Will of course, is a registered one, registered on 20.11.1991. Merely because the Will is a registered document, no solemnity can be attached to the same. Importance of registration of a Will during life time of a Testator cannot be underestimated. But it cannot be said that the Registration endorsements by itself would "completely" prove that the document was read over to the Executant and understood by him. Thus the registration itself is not a proof of testamentary capacity.

13.Considering the effect of registration of Will, in AIR 1962 SC 567 [Rani Purnima Debi and another. v. Kumar Khagendra Narayan Deb and anr.], the Supreme Court has held:

"If a Will has been registered, that is a circumstance which may, having regard to the circumstances, prove its genuineness. But the mere fact that a Will is registered will not by itself be sufficient to dispel all suspicion regarding it where suspicion exists, without submitting the evidence of registration to a close examination. If the evidence as to registration on a close examination reveals that the registration was made in such a manner that it was brought to the testator that the document of which he was admitting execution was a Will disposing of his property and thereafter he admitted its execution and signed it in token thereof, the registration Will dispel the doubt as to the genuineness of the Will. But if the evidence as to registration shows that it was done in a perfunctory manner, that the officer registering the Will did not read it over to the testator or did not bring home to him that he was admitting the execution of a Will or did not satisfy himself in some other way (as, for example, by seeing the testator reading the Will) that the testator knew that it was a Will the execution of which he was admitting, the fact that the Will was registered would

not be of much value. Registration may take place without the executant really knowing what he was registering. AIR 1930 PC 24 [Vellasami Servai v. Sivaraman Servai] and AIR 1932 Cal 574 [Surendra Nath v. Jnanendra Nath] and (S) AIR 1955 SC 346 [Girja Datt Singh v. Gangotri Datt Singh]. Relied upon."

14. In 2007(2) CTC 172 [Niranjan Umesh Chandra Joshi v. Mridula Jyoti Rao and others] in para 32, the Supreme Court has held as : "The burden of proof that the Will has been validly executed and is a genuine document, is on the propounder. The propounder is also required to prove that the testator has signed the Will and that he had put his signature out of his own free Will having a sound disposition of mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the propounder may be held to have been discharged. But, the onus would be on the applicant to remove the suspicion by leading sufficient and cogent evidence if there exists any. In the case of proof of Will, a signature of a testator alone would not prove the execution thereof if his mind may appear to be very feeble and debilitated. However, if a defence of fraud, coercion or undue influence is raised, the burden would be on the caveator. [See Madhukar D. Shende v. Tarabai Shedage (2002 (1) CTC 244 : 2002 (2) SCC 85) and Sridevi & Ors. v. Jayaraja Shetty and Ors. 2005(1) CTC 443 : 2005(8) SCC 784]. Subject to above, proof of a Will does not ordinarily differ from that of proving any other document".

15. In various decisions, the Supreme Court has pointed out the essential facts on proof of which, the onus on the propounder is discharged. The earliest decision to be referred to in this regard is AIR 1959 SC 443 [H. Venkatachala Iyengar vs. B.N. Thimmajamma and others], in which the Apex Court has laid down law as under :-

"19. However, there is one important feature which distinguishes Wills from other documents. Unlike other documents the Will speaks from the death of the testator, and so, when it is propounded or produced before a Court, the testator who has already departed the world cannot say whether it is his Will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last Will and testament of the departed testator. Even so, in dealing with the proof of Wills the Court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the Will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free Will. Ordinarily when the evidence adduced in support of the Will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, Courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the

essential facts just indicated."

16. In *Smt. Guro v. Atma Singh & Ors.* [1992 (2) SCR 30], this Court has opined :

"With regard to proof of a Will, the law is well settled that the mode of proving a Will does not ordinarily differ from that of proving any other document except as to the special requirement prescribed in the case of a Will by Section 63 of the Indian Succession Act. The onus of proving the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and signature of the testator as required by law is sufficient to discharge the onus. Where, however there were suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the Court before the Will could be accepted as genuine. Such suspicious circumstances may be a shaky signature, a feeble mind and unfair and unjust disposal of property or the propounder himself taking a leading part in the making of the Will under which he receives a substantial benefit the presence of suspicious circumstances makes the initial onus heavier and the propounder must remove all legitimate suspicion before the document can be accepted as the last Will of the testator".

17. Contention of the Defendants is that signature in Ex.P-1 Will is not the signature of the Testator and that Ex.P-1 is a fabricated document. Unlike other documents, execution of Will must be proved at least by one of the attesting witnesses. While making attestation, there must be *animus attestandi* on the part of the attesting witnesses, meaning thereby, he must intend to attest.

18. While two attesting witnesses - P.W.2 - Dilip (Aged about 21 years in 1991) and P.W.3 - Raju (Aged 23 years in 1991) were examined to prove execution and attestation of Will. At the time of execution of the Will, Vijayaranga Mudaliar was aged 72 years. In his cross examination, PW-2 has stated that he used to play cricket with the children of Vijayaranga Mudaliar and he was known to the Testator. PW-3, then aged about 23 years, was working under Vijayaranga Mudaliar. In their evidence, P.W.s 2 and 3 have stated that they went to Sub Registrar's office in an auto and Vijayaranga Mudaliar handed over the Will to the Sub Registrar and the Sub Registrar had enquired the Testator as to whether he understood the contents of the Will. P.W.s 2 and 3 have further stated that Testator went through the contents of the Will and signed in each page of the Will and Sub Registrar had asked them to attest the Will and P.W.s 2 and 3 have put their signature on the reverse side of the first page of Ex.P-1 in two places. During trial, when P.W.s 2 and 3 were examined, last page of the Will was missing. PW-2 has stated that after the Testator has affixed his thumb impression on the reverse of first page of Ex.P-1, P.W.s 2 and 3 have again signed on the reverse side of first page of Ex.P-1 - Will. Evidence of P.W.s 2 and 3 is to the effect that they signed on the reverse side of Ex.P-1 Will as identifying witness, identifying the signature of

the Executant of the Will on the reverse side. Since during trial last page of the Will was missing, last page was neither shown to P.W.s 2 and 3 nor had they chosen to depose about their attestation at the foot of the last page of the Will.

19.The learned Counsel for the Defendants 5 and 6 has drawn our attention to the format prescribed for the affidavit of a attesting witness under Form No.56 under Or.25 R.4-C of the Original Side Rules of the High Court. The Executant and the attesting witnesses of the said Will should subscribe their signatures at the foot of the Will viz., in the last sheet. As per Form No.56, paras 2 to 4, the deponent has to swear an affidavit to the effect that "the name and signature subscribed at the foot of the Testamentary paper as of the party executing the same is in the proper handwriting of the executant, subscribed and written at the foot of the Will and the deponent attested the execution of the same". While paragraphs 2 and 4 of the prescribed format insist upon the Testator and witnesses signing "at the foot of the Testamentary paper", oral evidence of P.W.s 2 and 3 is to the effect that they have signed on the reverse side of first page of Ex.P-1 Will. As noticed earlier, during trial the last page of the Will was not at all shown to the attesting witnesses, as it was not at all available during trial.

20.With anguish, the learned Single Judge has noticed that the affidavit of P.W.s 2 and 3 filed into Court were corrected. In paras 2 and 4 of the affidavits originally filed, the words "foot of the Will ..." have been typed. But the same had been corrected later as "on the reverse of the first page". The learned Single Judge has pointed out how the affidavits were corrected later and expressed doubts as to how corrections could have been made without the order of the Judge. We confirm the conclusion of the learned Single Judge that there was no animus attestandi to P.W.s 2 and 3 and there was no valid attestation.

21.Sec.68 of the Indian Evidence Act postulates the mode and manner in which proof of execution of document required by law is to be attested, stating that the execution must be proved by at least one attesting witness if an attesting witness is alive, and subject to the process of the Court and capable of giving evidence. Relying upon 1995 (6) SCC 213 [Kashibai v. Parwatibai], the learned Single Judge held that P.W.s 2 and 3 are only 'identifying witnesses' and they are not 'attesting witnesses'. In our considered view, P.W.s 2 and 3, having put their signature on the reverse side of first page of Ex.P-1 as identifying witness, are not attesting witnesses as their signature were not with "animus attestandi".

22.Considering the meaning of 'attesting witnesses', in AIR 1977 SC 63 [Beni Chand (since deceased) by L.Rs. v.Kamla Kunwar and ors.], the Supreme Court has held as follows :-

"By attestation is meant to signing of a document to signify that the attesor is a witness to the execution of the document; and by Sec.63(c) of the Succession Act, an attesting witness is one who signs the document in the presence of the executant after seeing the

execution of the document or after receiving a personal acknowledgment from the executant as regards the execution of the document. Where D and two others had signed below the thumb impression of the testatrix and D was examined and his evidence showed that he and two others saw the testatrix putting her thumb mark on the Will by way of execution and that they all signed the Will in token of attestation in the presence of the testatrix, after she had affixed her thumb-mark on the Will the execution was held proved in terms of Sec.63 of Succession Act read with Section 68 of the Evidence Act."

23.The learned Counsel for the appellants have contended that P.W.s 2 and 3 could not speak about their signature in the last page of the Will since the last page of the Will was missing during trial. It was submitted that in any event, the evidence of P.W.s 2 and 3 would satisfy the requirements of proof of Will under Sec.63(c) of the Succession Act. This contention does not merit acceptance. In our considered view, mere putting signature on the reverse side of the Will as identifying witness would not prove the execution of the Will.

24. Missing of last page :-

C.M.P.No.116/2001 has been filed under Or.14 R.8 Original Side Rules to receive Ex.P-1 Will. Noticing missing of last page, the learned Single Judge found it to be one of the suspicious circumstance not explained by the plaintiffs. In the appeal, CMP No.116/2001 has been filed under Or.41 R.27 CPC r/w Or.14 R.8 O.S. Rules to receive the last page of the Will as additional Evidence. In the affidavit, the second plaintiff has averred that while taking xerox copies, last sheet of the Will was mixed up with other papers and it could not be found during trial and while she was searching some old papers, the same was found and after contacting the counsel, she has filed application to receive additional documents. In the affidavit, it is further alleged that inspite of diligent efforts, last sheet of the Will could not be traced out.

25.Contending that under Or.41 R.27 CPC, the Appellate Court has power to allow additional evidence, not only if it requires such evidence to enable it to pronounce Judgment but also for any other substantial cause, the learned Counsel for the appellants plaintiffs relied upon 1997 (7) SCC 297 [Jaipur Development Authority v. Kailashwati Devi], 2002(2) SCC 686 [P.Purushottam Reddy and another Vs.Pratap Steels Ltd.], AIR 1951 SC 193 [Arjan Singh v. Kartar Singh] and AIR 1963 SC 1526 [K.Venkataramiah v. A.Seetharama Reddy and ors.].

26.Receiving additional evidence is strongly objected to by the contesting Defendants. The learned Counsel for the Defendants 5 and 6 has submitted that in the absence of evidence showing diligent steps taken, additional evidence cannot be received to fill up the lacuna. In support of his contention, the learned Counsel placed reliance upon AIR 2001 SC 134 [Mahavir Singh and ors. v. Naresh Chandra and anr.].

27.Or.41 R.27 CPC envisages certain circumstances when additional evidence can be adduced. For admitting additional evidence, the Appellate Court must be satisfied that it could not be produced inspite of due diligence. Before a party is allowed to produce additional evidence he has to establish that the evidence was not within his knowledge or could not, after exercise of due diligence, be produced by him at the time when the Decree appealed against was passed. The Appellate Court must be satisfied that the additional document sought to be produced could not be produced before the trial Court inspite of due diligence.

28.One of the primary duty of the appellants is to show that there was no want of diligence on their part. In our view such evidence is lacking in this case. When PW-1 [first plaintiff] was confronted about the missing of the last page, she tried to justify that Ex.P-1 consists of seven pages and Ex.P-1 contains all the pages. According to PW-1, "no pages are missing". It is to be pointed out no steps had been taken by the plaintiffs to obtain registration copy of the Will so as to make available the last page of the Will before the learned Trial Court. Nor the plaintiffs have summoned the Sub Registrar though the Will was registered. There is no explanation for not producing even registration copy of the Will. In our view, when no such diligent steps were taken, additional evidence cannot be received. It is also to be noted that PW-1 in her evidence has stated that Ex.P-1 Will contains seven pages and no page is missing. On the contrary, in the affidavit sworn by the second plaintiff, the deponent has averred that while taking xerox copies of the Will, last sheet of the Will was mixed up with other papers and could not be traced and after it was traced out the same was handed over to the counsel for filing application to receive the additional evidence. In our considered view, evidence of PW-1 and the averments in the affidavit are irreconcilable.

29.The learned Counsel for the appellants contended that to render substantial justice, the discretion given to the Appellate Court under Or.41 R.27 CPC is to be judicially exercised. Placing reliance upon AIR 1963 SC 1526 [K.Venkataramiah v. A.Seetharama Reddy and ors.], it was further submitted that Court can allow additional evidence for any other substantial cause and such requirement of the Court would ordinarily arise only when the defect becomes apparent on the examination of the evidence. In the aforesaid decision, considering the power of Appellate Court to admit additional evidence, the Supreme Court has held as under:-

"The object of R.27(2) clearly is to keep a clear record of what weighed with the Appellate Court in allowing the additional evidence to be produced - whether this was done on the ground (i) that the Court appealed from had refused to admit evidence which ought to have been admitted, or (ii) it allowed it because it required it to enable it to pronounce Judgment in the appeal or (iii) it allowed this for any other substantial cause. Where a further appeal lies from the decision of the Appellate Court such recording of the reasons is necessary and useful also to the Court of further appeal for deciding whether the discretion under the rule

has been judicially exercised by the Court below. The omission to record the reason must, therefore, be treated as a serious defect. Even so, the provision is not mandatory and the omission of the High Court to record reasons for allowing additional evidence does not vitiate such admission. It is true that the word 'shall' is used in R.27(2) but that by itself does not make it mandatory. ILR 12 Cal 37, Rel. on"

30. Under Or.41 R.27 (1)(b) CPC, the Appellate Court may require additional evidence to be produced so as to enable it to pronounce better Judgment, or for any other substantial cause or like nature. The expression "or for any other substantial cause" mentioned in Or.41 R.27(1)(b), the requirement must be that of the Court and not of the party. If the evidence could have been tendered in the lower Court and the party has not been vigilant in producing it, then that evidence cannot be allowed to be let in at the appellate stage on the supposition that a substantial cause for producing it exists in appeal.

31. When the Appellate Court finds itself unable to pronounce Judgment owing to a lacuna or defect in the evidence as it stands, it may admit additional evidence. The ability to pronounce Judgment is to be understood as the ability to pronounce Judgment satisfactorily to the mind of the Court delivering it. It is only a lacuna in the evidence that will empower the Court to admit additional evidence [See *The Municipal Corporation of Greater Bombay v. Lala Pancham*, AIR 1965 SC 1008; *Mahavir Singh v. Naresh Chandra*, AIR 2001 SC 134 (136) : 2001(1) SCC 309]. But a mere difficulty in coming to a decision is not sufficient for admission of evidence under this rule [*Mahavir Singh v. Naresh Chandra*, AIR 2001 SC 134 (136) : 2001(1) SCC 309].

32. We find no justification to receive additional evidence. Though the plaintiffs firmly contended that the Will was a registered document, plaintiffs had not taken steps to produce the registration copy of the Will. The learned Single Judge found missing of the last page as one of the suspicious circumstances. Receiving additional evidence in the appellate stage would have the effect of nullifying that finding. We are of the view that additional evidence is not required since even by receiving additional evidence, the surrounding suspicious circumstance cannot be dispelled.

33. Suspicious circumstances:-

Let us now turn to the various suspicious circumstances urged. We have already pointed out that the learned Single Judge was of the view that there were several suspicious circumstances attending to execution of the Will and free disposition.

34. The law is well-settled that if there is a suspicious circumstance about the execution of the Will, it is the duty of the person seeking declaration about the validity of the Will to dispel such suspicious circumstances. In this connection, reference may be made to the decision

of the Supreme Court in Rani Purnima Debi and anr. v. Kumar Khagendran Narayan Deb and anr. (AIR 1962 SC 567). It has been held in the said decision that if a Will being registered and having regard to the other circumstances, is accepted to be a genuine, the mere fact that the Will is a registered Will it Will not by itself by sufficient to dispel all suspicions regarding the validity of the Will where suspicions exist. In AIR 1959 SC 443 [H.Venkatachala Iyengar vs. B.N.Thimmajamma and others], it has been held in the said decision that where the propounder was unable to dispel the suspicious circumstances which surrounded the question of valid execution and attestation of the Will, no letters of administration in favour of the propounder could be granted.

35.Observing that whenever there is any suspicious circumstance, an obligation is cast on the propounder of the Will to dispel suspicious circumstance, in AIR 1998 SC 2861 [Gurdial Kaur & Ors. v. Kartar Kaur & Ors.], the Supreme Court has held as follows :-

"4.The law is well settled that the conscience of the Court must be satisfied that the Will in question was not only executed and attested in the manner required under the Indian Succession Act, 1925 but it should also be found that the said Will was the product of the free volition of the executant who had voluntarily executed the same after knowing and understanding the contents of the Will. Therefore, whenever there is any suspicious circumstance, the obligation is cast on the propounder of the Will to dispel suspicious circumstance."

36.Some of the suspicious circumstances had been pointed out by the Supreme Court in 2007(2) CTC 172 [Niranjan Umeshchandra Joshi v. Mridula Jyoti Rao], which are as under:-

"33.There are several circumstances which would have been held to be described by this Court as suspicious circumstances :

(i)When a doubt is created in regard to the condition of mind of the testator despite his signature on the Will;

(ii)When the disposition appears to be unnatural or wholly unfair in the light of the relevant circumstances;

(ii)Where propounder himself takes prominent part in the execution of Will which confers on him substantial benefit.

See H.Venkatachala Iyengar v. B.N.Thimmajamma & Ors. AIR 1959 SC 443; and Management committee, T.K.Ghosh's Academy v. T.C.Palit & ors. AIR 1974 SC 1495.

37.In Ex.P-1 Will, it is alleged that "Testator has made adequate provision for his other sons viz., Narayanamoorthy and Segar" and having regard to the fact that he has not made any provision for his other two sons, viz., Kannan, Vasudevan and daughter Yamuna Bai, the Testator is said to have executed the Will bequeathing his properties. The statement that Testator has made adequate provision for his other sons Narayanamoorthy and Sekar and not made provision for other sons and daughter is incorrect. It is not in dispute that under Ex.P-2 - Settlement

Deed, the Testator has retained about 5 grounds in Choolaimedu with a view to make provision for his four sons.

38.The recitals in Ex.P-2 are to the effect that settlor Vijayaranga Mudaliar has divided the 'A' Schedule Property into six portions marked as A, B, C, D, E and F as shown in the plan annexed. 'B' Schedule Property was settled in favour of D-5 Narayanamoorthy. We have perused the plan annexed to Ex.P-2 - Settlement Deed produced before us. It is not in dispute that the settlor has retained 'A' Schedule Property and settled C, D, E and F schedule properties to Sekar (D-6), Kannan (D-2), Vasudevan (D-1) and Yamuna Bai (D-3) respectively and 'B' Schedule Property to D-5 - Narayanamoorthy. Evidently, Testator had made provision not only for D-5 and D-6 but also for other sons viz., Kannan and Vasudevan and daughter Yamuna Bai. To put it differently, all the sons and daughter were provided for in Ex.P-2 Settlement Deed. The statement in Ex.P-1 Will that no provision was made for the sons Kannan, Vasudevan and daughter Yamuna Bai is demonstrably incorrect. In the said Will, large extent of property both in Chennai and in Sriperumbudur were allotted to Kannan, Vasudevan and Jamuna Bai. Situated thus, we find that the exclusion of other sons is unnatural and that is a suspicious circumstance, which is not satisfactorily explained.

39.Another suspicious circumstance is the absence of entry in the diary regarding execution of Will. It has been proved and admitted that the Testator was in the habit of writing diary. We have carefully gone through the various pages of Ex.P-4 Diary and it was noticed that Vijayaranga Mudaliar had written even minute details like "purchase of petrol, coconut saplings and money spent on labour for planting coconut saplings' etc. Vijayaranga Mudaliar had also written about the accident on 20.09.1991 and his hospitalization in Best Hospital. As observed by the learned Single Judge, Vijayaranga Mudaliar was a methodical person, who was in the habit of meticulously writing diary. Vijayaranga Mudaliar had also written about his visit to Lawyer for consultation about writing the Will. While so, it is quite improbable that he would have omitted to write about the execution of the Will on 20.11.1991. Non mention about execution of Will in the diary is certainly a formidable suspicious circumstance to be reckoned with.

40.Let us now revert back to the attesting witnesses. Vijayaranga Mudaliar was a Doctor LMP [Licensed Medical Practitioner]. He was running medical factory and at the time of alleged execution of the Will, he was aged about 80 years. If really Vijayaranga Mudaliar intended to execute a Will, the natural conduct might have been to call his elderly friends and relatives to attest the Will. But that was not to be so. As noticed earlier, P.W.s 2 and 3 are young adults. PW-2 was a playmate of children of Vijayaranga Mudaliar and PW-3 is said to have been employed under Vijayaranga Mudaliar. Evidence of P.W.s 2 ad 3 that they have been called by Vijayaranga Mudaliar to attest in the Will is certainly a suspicious circumstance, not being explained.

41. At times, Vijayaranga Mudaliar used to sign as Dr. Vijayarangam. For instance, in his Gas Transfer Application, he has signed as 'Dr. Vijayarangam', whereas in the Will, he has signed only as 'Vijayarangam'. The learned Single Judge has pointed out this as one of the suspicious circumstance. By perusal of Ex.P-2, it is seen that in Ex.P-2 Settlement Deed, Vijayaranga Mudaliar has signed as 'Vijayarangam' and not as 'Dr. Vijayarangam'. We are of the view that the mode of signing is trivial and we do not propose to go deep into this aspect.

42. Placing reliance upon 2002 (2) SCC 85 [Madhukar D. Shende v. Tarabai Aba Shedage], the learned Counsel for the plaintiffs contended that if evidence adduced is convincing, satisfying the conscience of the Court and when there is nothing unnatural about the transaction, mere conjectures or unfounded suspicious circumstances should not be allowed to sway the verdict. It was submitted that D-5 and D-6 being employed and other sons and daughter not being employed, quite naturally, Vijayaranga Mudaliar would have thought it fit to bequeath the properties and Ex.P-1 is a natural disposition. In the aforesaid decision, the Supreme Court has held as follows :-

"8. The requirement of proof of a Will is the same as any other document excepting that the evidence tendered in proof of a Will should additionally satisfy the requirement of Sec. 63 of the Indian Evidence Act, 1925 and Sec. 68 of the Indian Evidence Act, 1872. If after considering the matters before it, that is, the facts and circumstances as emanating from the material available on record of a given case, the Court either believes that the Will was duly executed by the testator or considers the existence of such fact so probable that any prudent person ought, under the circumstances of that particular case, to act upon the supposition that the Will was duly executed by the testator, then the factum of execution of Will shall be said to have been proved. The delicate structure of proof framed by a judicially trained mind cannot stand on weak foundation nor survive any inherent defects therein but at the same time ought not to be permitted to be demolished by wayward pelting of stones of suspicion and supposition by wayfarers and waylayers. What was told by Baron Alderson to the jury in [1838(2) Lewis CC 227] may be apposite to some extent:

"The mind was apt to take a pleasure in adapting circumstances to one another and even in straining them a little, if need be, to force them to form parts of one connected whole, and the more ingenuous the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete".

The conscience of the Court has to be satisfied by the propounder of Will adducing evidence so as to dispel any suspicious or unnatural

circumstances attaching to a Will provided that there is something unnatural or suspicious about the Will. The law of evidence does not permit conjecture or suspicion having a place of legal proof nor permit them to demolish a fact otherwise proved by legal and convincing evidence. Well-founded suspicion may be a ground for closer scrutiny of evidence but suspicion alone cannot form the foundation of a judicial verdict - positive or negative".

43.Suspicious circumstances pointed out by the trial Court and discussed by us cannot be said to be unfounded suspicions and suppositions. In our view, the suspicious circumstances are formidable which the appellants have not dispelled.

44.We have scrutinized the evidence carefully. The evidence adduced by the plaintiffs falls short of proving due execution and attestation of the Will. The bald fact of registration which as per the aforesaid decision of Supreme Court in AIR 1962 SC 567 [Rani Purnima Debi and anr. v. Kumar Khagendra Narayan Deb and anr.], is insufficient, in the circumstances of this case to dispel the suspicious circumstances, which we have enumerated above. We therefore hold that the suspicious circumstances surrounding the execution and attestation of the Will are not dispelled. In the circumstances, no probate of the Will could be granted and the appeal is liable to be dismissed.

45.We therefore, dismiss the appeal, confirming the Judgment of the learned Single Judge in T.O.S.No.10/1996. No costs.
tar

Sd/
Asst. Registrar

/true copy/

Sub Asst.Registrar

To

1. The Sub Assistant Registrar, Original Side, High Court, Chennai.
+ One cc to mr. Ajoykumar, Gnaman, Advocate SR 51335
+ One cc to M/s P. Seshadri, Advocate SR 51136

AKR (co)
sg 3/9/07

O.S.A. No.2/2001
16.08.2007

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